Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

MASTER SERGEANT MATHEW G. CABRAL, JR.,
PETITIONER

*v.*

UNITED STATES OF AMERICA, RESPONDENT

**Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces**

## PETITION FOR WRIT OF CERTIORARI

Harold M. Vaught
Captain, United States Air Force
Appellate Defense Counsel
*Counsel for Petitioner*

Douglas H. Kohrt
Colonel, United States Air Force
Chief, Appellate Defense Division
*Counsel of Record*

Air Force Legal Services Agency
Appellate Defense Division
172 Luke Avenue, Suite 343
Bolling AFB, DC 20332-8000
202-767-1562

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## QUESTIONS PRESENTED

Whether the petitioner was denied the opportunity for effective cross-examination.

Whether petitioner's punitive discharge violates both the fifth and eighth amendments to the Constitution.

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The petitioner, Master Sergeant Mathew G. Cabral, Jr., respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case, issued on 30 September 1997.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces, reported at No. 96-0596,__MJ__(30 September 1997), is located at Appendix A. The opinion of the United States Air Force Court of Criminal Appeals, *United States v. Cabral*, 43 MJ 808 (AFCt.CrimApp 1996) is located at Appendix B.

## JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on 30 September 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259 (3) (West Supp. 1996) and 10 U.S.C. § 867(a) (West Supp. 1996).

## STATEMENT OF THE CASE

On 8 April 1993 charges of sodomy and indecent acts with a child were preferred against petitioner, and immediately thereafter on 14 and 15 April 1993 an Article 32 hearing was held. Petitioner was then tried by a general court martial at Norton Air Force Base, California, on 28—29 July and 31 August—3 September 1993. Contrary to his pleas he was convicted of attempted sodomy with a child under the age of 16 in violation of Article 80, UCMJ [10 USC § 880] and two specifications of indecent acts and liberties with a child, in violation of Article 134, UCMJ [10 USC § 934]. Appellant was sentenced to a dishonorable discharge, confinement for

seven years, and reduction to the lowest enlisted grade. The convening authority approved the findings and the sentence as adjudged.

The United States Air Force Court of Criminal Appeals heard oral argument in the case and on 23 January 1996 affirmed the conviction. *United States v. Cabral*, 43 M.J. 808 (A.F.Ct.Crim.App. 1996)(Appendix B). The United States Court of Appeals for the Armed Forces granted review with respect to the questions presented in this petition and subsequently affirmed the findings and sentence. (Appendix A).

Appellant's wife was the full-time babysitter of Jessica J., a four year old child, and her brother, Justin, two years old. (R. 83). On Friday, 22 January 1993, sometime after 1800 hours, Jessica told her mother that her "hoi" hurt. (R. 85). Jessica referred to her vaginal area as her hoi, which is the Thai term for vagina. Upon visually examining the area the child's mother noticed some redness. When asked by her mother how the redness occurred, Jessica replied that "LuMac play too rough." LuMac is the Thai word for uncle and the name Jessica called petitioner. When her mother asked Jessica what played too rough meant, Jessica placed her hand in the vaginal area and began rubbing up and down. The mother immediately confronted the Cabrals with these allegations. The Cabrals denied any abuse.

On 23 January 1996 Jessica's mother took her to see a nurse who confirmed the redness. (R. 86). The nurse, Ms. Geise, said that she was required to report this to the local police and the state authorities. Jessica's parents described the alleged acts to Ms. Geise in Jessica's presence. The next day prior to calling the local police, the mother again questioned Jessica about what happened. Jessica at this point agreed that petitioner licked, rubbed and inserted his finger in her "hoi." She also said that petitioner "spanked his ding-

dong" and touched Justin's "ding-dong" before he stopped when Mrs. Cabral came home. (R. 91).

After questioning by a local police detective, Mr. Graves, Jessica finally talked to an agent with the Air Force Office of Special Investigations (OSI), SA Chambers. After interviewing Jessica's mother on 29 January 1993, Jessica was taken to the OSI office on 1 February for her interview session which was ultimately videotaped. (R. 91–92, App Ex. VIII). However, *only a portion* of that interview was taped. A 20-minute pre-interview "rapport-building" session was not recorded.

At trial, the defense sought to exclude any testimony of Jessica, arguing that Jessica was not competent because her ability to observe, recollect, understand and communicate was not adequate. (R. 15–18). The Military Judge deemed Jessica unavailable as a witness because she refused to answer any questions in court. ( R. 81). Subsequently, he admitted the videotaped interview in evidence, citing the residual hearsay rule, Mil. Rule Evid 804(b) (5). (R. 145–147).

On review before the United States Court of Appeals for the Armed Forces, that court specified the issue of whether this ruling by the military judge deprived the petitioner of the opportunity for effective cross-examination. In a two part analysis, the lower court determined that Jessica was correctly found unavailable to testify within the meaning of Mil.R.Evid. 804(a)(2)(a witness is unavailable where he or she "persists in refusing to testify concerning the subject matter…")(Appendix A). It further found "particularized guarantees of trustworthiness" to support admission under the residual hearsay rule, citing "spontaneity", "consistent repetition", "child-like terminology" and "lack of motive to fabricate." However, the majority of the court below fails to deal with other circumstances surrounding the videotaped interview tending to detract from the reliability of the

videotaped interview, i.e., the fact that the videotaped interview was provided to a law enforcement officer in the course of criminal investigations, that the child was very young and therefore susceptible to suggestion and manipulation, and that the taped interview omitted a 20-minute "rapport-building" session which preceded the interview, thus raising questions as to what the investigator said to the child just before he recorded her interview. *See* Appendix A, Effron, J. (concurring in the result). Herein, the petitioner focuses on the lower court's finding of trustworthiness notwithstanding these circumstances clearly detracting from the reliability of the out-of-court statements which were admitted.

Prior to the court-martial Appellant had served on active duty for over 20 years. Appellant had even requested retirement by submitting his retirement papers.

## REASONS FOR GRANTING THE WRIT

### THE PETITIONER WAS DEPRIVED OF THE OPPORTUNITY FOR EFFECTIVE CROSS-EXAMINATION.

Members of the military are guaranteed certain fundamental rights that are protected by the United States Constitution and federal laws. One such right is the right to confront and cross-examine witnesses. *See United States v. Stombaugh*, 40 M.J. 208, 212 (CMA 1994) (citations omitted). The main and essential purpose of confrontation is to secure for the opponent the opportunity to cross-examine. *Davis v. Alaska*, 415 U.S. 308, 315–316 (1979).

Clearly, the admission of out-of-court hearsay evidence may implicate the criminal accused's right to cross-examine and confront adverse witnesses. However, hearsay is constitutionally admissible against the accused *if* the out-of-

court declarant is unavailable to testify and the hearsay statement falls within a firmly rooted exception to the hearsay rule or has "particularized guarantees of trustworthiness." *Idaho v. Wright*, 497 U.S. 805, 816 (1990) *quoting Ohio v. Roberts*, 448 U.S. 56, 66 (1980). As the court below implicitly recognized , the residual hearsay rule, Mil.R.Evid. 804(b)(5), is *not* a firmly rooted hearsay exception. Thus, we must find special guarantees of trustworthiness sufficient to render the "declarant's truthfulness. . .so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility. . ." *Wright*, 497 U.S. at 820. Such circumstantial guarantees of trustworthiness can be found only in the circumstances surrounding the making of the out-of-court statement and may not be found in other evidence corroborating the occurrence of a crime. *Id.* at 821–822. Further, such guarantees of trustworthiness must be sufficient to overcome the *presumption of inadmissibility* accorded to accusatory hearsay statements which are not admitted pursuant to a firmly rooted hearsay exception. *Id.* at 827 *citing Lee v. Illinois*, 476 U.S. 530 at 543.

The circumstances surrounding the videotaped interview admitted at trial, viewed in total, simply do not provide such compelling guarantees of trustworthiness sufficient to overcome this presumption of inadmissibility. The videotaped interview was given to a military investigator in the course of investigations. Because it is recognized that law enforcement officers are not mere impartial observers, but are "engaged in the often competitive enterprise of ferreting out crime", accusatory hearsay statements given in the course of investigations are reasonably viewed with skepticism. *See Johnson v. United States*, 333 U.S. 10, 14 (1948); *United States v. Cordero*, 22 MJ 216, 223 (CMA 1986) *citing, inter alia, Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979). This skepticism is only compounded where the out-of-court

statement is given by a very young child accuser; today, it is common knowledge that young children are particularly susceptible to adult suggestion or manipulation (whether purposeful or unintended) in a situations of suspected child sexual abuse. *See, e.g.*, Anderson, Note, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S.Cal L.Rev. 2117, 2146 (Sept. 1996)("The consensus in the social-science literature indicates that, depending on the procedures used, children can be suggestible, and coercive interviewing techniques can render their accounts of abuse unreliable.") *citing*, Younts, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 41 Duke L.J. 691 (1991).

Adding to our reasonable skepticism and the weight of the presumption of inadmissibility still further is the specter of improper taint associated with the fact that military investigators recorded *only the latter portion* of their conversation with the child accuser. What was said by investigators in preparation for the taped interview is not revealed by the record, but the absence of this information certainly does nothing to bolster the trustworthiness of the out-of-court statements admitted.

While the majority of the court below emphasizes certain circumstances which may *generally* enhance reliability (e.g., spontaneity, consistent repetition within the recorded interview), these factors are not an accurate indicator of trustworthiness where the circumstances of the interview were pregnant with the potential for improper manipulation by law enforcement seeking to build a case for the sexual abuse of a 4 year old child. *See Wright*, 497 U.S. at 826–827 (where there is evidence of prior interrogation by adults of purported victim of child sex abuse, "spontaneity may be an inaccurate measure of trustworthiness") *quoting State v. Robinson*, 153 Ariz. 191, 201, 735 P.2d 801, 811 (1987). While the

petitioner did not develop a record to tell us what was said during the pre-interview rapport session, the burden is not on him to show the untrustworthiness of the admitted statement. Rather, the burden is on the State to show particularized guarantees of trustworthiness sufficient to overcome the presumption of inadmissibility. This the government failed to do.

## PETITIONER'S PUNITIVE DISCHARGE VIOLATES BOTH THE FIFTH AND EIGHTH AMENDMENTS TO THE CONSTITUTION.

This issue has been the subject of other petitions for writs of certiorari, which this Honorable Court has denied. *See, e.g., Sumrall v. United States*, 117 S.Ct. 961, 136 L.Ed. 2d 847 (1997). This issue is asserted to preserve it for future judicial review.

## CONCLUSION

Clearly, the petitioner's rights under the Confrontation Clause of the Sixth Amendment were violated by the admission of this evidence necessary to support the petitioner's court-martial conviction. Additionally, the punitive discharge which was imposed violates the petitioner's rights under the fifth and eighth amendments. This petition for a writ of certiorari should therefore be granted.

HAROLD M. VAUGHT
Captain, United States Air Force
Appellate Defense Counsel
*Counsel for Petitioner*

DOUGLAS H. KOHRT
Colonel, United States Air Force
Chief, Appellate Defense Division
*Counsel for Record*

Air Force Legal Services Agency
Appellate Defense Division
112 Luke Avenue, Suite 343
Bolling AFB, DC 20332-8000
202-767-1562

November 1997

## APPENDIX A

UNITED STATES, Appellee,

*v.*

Matthew G. CABRAL, Jr., Master Sergeant
U.S. Air Force, Appellant

No. 96–0596

Crim. App. No. 30953

U.S. Court of Appeals for
the Armed Forces

Argued March 5, 1997

Decided September 30, 1997

*Counsel*

For Appellant: *Lynmarie Cusack* (argued); *Gary Myers* and *Major Ormond R. Fodrea* (on brief); *Colonel Jay L. Cohen*, *Lieutenant Colonel Kim L. Sheffield*, and *Captain Richard D. Desmond.*

For Appellee: *Captain Deborah M. Carr* (argued); *Colonel Theodore J. Fink* and *Lieutenant Michael J. Breslin* (on brief); *Colonel Jeffery T. Infelise.*

Military Judge: Robert E. Kaszczuk

*Opinion of the Court*

CRAWFORD, Judge:

Contrary his pleas, appellant was convicted of attempted sodomy with a child under the age of 16 and taking indecent liberties with and committing indecent acts upon a child under the age of 16, in violation of Articles 80 and 134, Uniform

Code of Military Justice, 10 USC §§ 880 and 934, respectively. The convening authority approved the sentence of a dishonorable discharge, 7 years' confinement, and reduction to the lowest enlisted grade. The Court of Criminal Appeals affirmed the findings and sentence. 43 MJ 808. We granted review of the following specified issue:

WHETHER APPELLANT WAS DEPRIVED OF THE OPPORTUNITY FOR EFFECTIVE CROSS-EXAMINATION.[1]

We hold that there was no violation of appellant's Sixth Amendment right and that the judge did not abuse his discretion in admitting the videotape of the victim. [2]

## FACTS

On January 22, 1993, while watching television, 4-year-old J told her mother that her vaginal area hurt. Her mother took her to the restroom, thinking that she needed to be cleaned up but noted a red irritated spot on J's vagina. When asked how this happened, J informed her mother that appellant, her babysitter's husband, "play so rough with me." J's mother and father decided to confront the Cabrals that evening over the telephone. Thereafter, appellant asked about their plans concerning the allegations. J's father informed appellant that they would take J to the clinic the next day. After the call from J's parents, appellant and his wife called J's house that night so many times that J's mother had to take the phone off the hook.

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[1]We also granted review of "whether petitioner's punitive discharge violates both the Fifth and Eighth Amendments to the Constitution." Appellant concedes that this was adversely decided against him in *United States v. Sumrall*, 45 MJ 207 (1996)

[2] The challenge on appeal is as to admissibility of the videotape of the statement given to Special Agent Chambers.

The next day, Saturday, J was examined by a nurse-practitioner who noted the irritation in J's vaginal area. Because she did not have the equipment for further examination, she referred J to a specialist. After the examination on Saturday, appellant called J's mother and said, "Please do not report" this. He said that he would lose his retirement and that he had a family to support. Later that day, immediately before making a report to the police department, J's mother went to appellant's house. At that time, appellant asked if J's mother had been seen by the Child Protective Services. Her mother did not understand and asked "What is Child Protective" Services? Appellant responded, "You will find out. You will be sorry."

On January 27, 1993, five days after J initially reported this incident to her parents, appellant submitted his retirement papers.

On February 1, 1993, nine days after J's abuse was discovered, she had a videotaped interview with Special Agent (SA) Chambers of the Air Force Office of Special Investigations (OSI). During this interview, J detailed the abuse in response to non-leading questions.

On February 2, 1993, J was taken to the emergency room in the San Antonio Community Hospital where she was examined by a nurse who specialized in sexual assaults. Ms. Ann Kristine Rowney took pictures of J's vaginal area. These pictures showed "a thinning or a sparing [sic] of the tissue" at the base of the vaginal opening and an "abrasion on the inner aspect of her left labia majora, which is in the vestibule." These observations are consistent with findings of sexual abuse, especially the abrasion in the vestibule area. The thin tear by the anus was less suspicious.

On April 14, 1993, J appeared at appellant's hearing under Article 32, UCMJ, 10 USC § 832, but was reluctant to answer questions. The next day, SA Chambers sat with J at the

OSI office and asked her questions presented by the Government and the defense. The parties watched from an adjoining room. The examination was videotaped. A 20-minute rapport session was not videotaped. However, SA Chambers testified that he did not ask J any questions about the alleged abuse during that session.

On a prosecution motion to admit the first videotape statement to SA Chambers, J was called as a witness. However, after she was unable to answer questions even as to her name, the judge asked the defense if they had been able to talk to her. Trial defense counsel stated that there had been " a very non-informative meeting" at her house the previous night. The judge asked if the defense would like another attempt to talk with the child. The individual military counsel replied, "Well, Your Honor, I'm not waiving any right to cross-examine her, but under the circumstances it looks to me like she's not available to testify in this courtroom."

Later an expert, Dr. Ebert, testified that J was not able to testify in a manner that would produce effective examination from either side. Dr. Ebert further testified that J would absolutely not be able to testify in open court and that he did not see a closed-circuit camera "as being an effective method either."

After this testimony, the military judge found J unavailable as a witness under Mil.R.Evid. 804(a), Manual for Courts-Martial, United States (1995 ed.), and admitted the videotapes and the statements under Mil.R.Evid. 804(b)(5), the residual-hearsay rule. The military judge relied on the following indications of the statements' trustworthiness:

> Fifth, I find that the videotape of 1 February 1993 is admissible as residual hearsay and does not violate the accused's right to confrontation in this case.

Sixth, I find that the 1 February 1993 videotape interview is the most probative evidence of the two sources of evidence. The court members will be able to directly observe the demeanor of [J] as she responds to questions. Furthermore, the court members will hear her testimony directly without a third party, the mother, recalling what the child said to her.

Seventh, I find that the 1 February 1993 videotape is more probative on the points for which it is offered than any other evidence which the Government can procure through reasonable efforts. In fact since the child is unavailable, it is the only evidence other than the testimony of the mother that describes all of the alleged acts committed against the child by the accused.

Eighth, I find that the offered testimony of [J] has the circumstantial guarantees of trustworthiness as follows:

First, the seriousness of the allegations made against the accused was emphasized by Special Agent Chambers.

Second the necessity for honesty was emphasized to the child, and she repeatedly acknowledged that she would be truthful.

Third, the questions asked of [J] were not leading or overly suggestive in light of [J]'s age of 4 years old at the time of the videotape. The questions may not have been objectionable in court during her testimony on direct examination had she been available.

Fourth, the questions by Special Agent Chambers and answers of [J] were not rehearsed.

Fifth, it would have been almost impossible for a 4-year-old child to fabricate an entire incident as complex as the one described in the videotape.

Sixth, [J] is very honest in the sense that she was still young enough at the time that she lacked inhibitions which would cause her to hold back information. A 4-year-old child lacks knowledge of the sexual world which would enable her to be creative in this area.

Seventh, [J]'s information and knowledge with regard to the alleged sexual offenses is not within the realm of common knowledge for a normal 4-year-old child. There has been no credible evidence presented that this knowledge could have been acquired by [J] in any other way than as a victim of sexual assault by the accused in the time frame, the place, and the manner alleged.

Eighth, the language used by the child in describing the sexual acts which allegedly occurred are age-appropriate for a 4-year-old child. The language itself used by the child is strong evidence that the child was not coached by an adult, but was using her limited terminology and knowledge of the ways of the world to describe what she actually observed and experienced.

Ninth, no cogent motivation for the child to lie was suggested.

Tenth, the child was speaking from first-hand knowledge.

And finally, the circumstances of giving the statement were neither coercive or unduly suggestive.

My ninth conclusion of law includes the finding that the general purpose of these rules and the interests of justice will be served by admission of the videotape into evidence. There is no other evidence to be presented to the trier of fact available in this case.

## DISCUSSION

The Sixth Amendment guarantees servicemembers the right of compulsory process and confrontation. In *Ohio v. Roberts*, 448 U.S. 56, 63 (1980), the Supreme Court expressed a preference for face-to-face confrontation at trial. Hearsay is constitutionally admissible against the accused when the witness is unavailable and the hearsay statement falls within a firmly rooted exception[3] or has "particularized guarantees of trustworthiness." *Idaho v. Wright*, 497 U.S. 805, 816 (1990), quoting *Roberts*, *supra* at 66.

As to the constitutional requirement of showing unavailability, the Court in *White v. Illinois*, 502 U.S. 346, 354 (1992), announced "that [the] unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding." But *White* did not eliminate the requirement that the statement fall under a firmly rooted exception or be reliable. *Id.* at 355–57. However, as we have indicated in past opinions, a finding of unavailability is relevant in deciding what factors may be employee in determining the reliability of the out-of-court statement.[4]

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[3]There are a number of firmly rooted exceptions: *White v. Illinois*, 502 U.S. 346, 355 (1992) (excited utterance and medical exception); *United States v. Inadi*, 475 U.S. 387 (1986) (statement of co-conspirators); *United States v. Jacobs*, 44 MJ 301, 306 (1996) (declaration against interest).

[4]*See, e.g., United States v. McGrath*, 39 MJ 158 (CMA 1994).

> Chief Justice Rehnquist recognized that *Roberts* might suggest that the Confrontation Clause generally requires that a declarant either be produced at trial or be found unavailable before his out-of-court statement may be admitted into evidence. However, we think such an expansive reading of the Clause is negated by our subsequent decision in [*United States v.*] *Inadi*, [475 U.S. 387 (1986)].

*White, supra* at 353.

While *Inadi* involved evaluating statements of co-conspirators, its "observations" apply with full force to excited utterances and statements admitted under the medical exception because these statements cannot be duplicated simply by the declarant later testifying in court. *Id.* at 355–56. The same rationale might not be applied so easily to a statement to a police officer.

In any event, the Court in *White* rejected White's argument that *Maryland v. Craig*, 497 U.S. 836 (1990), would apply. *Id.* at 358. It noted, that "*Craig* involved only the question of what *in-court* procedures are constitutionally required to guarantee a defendant's confrontation right once a witness is testifying." *Id.*

We have been very cautious about admitting pretrial statements by child victims made to the police under the residual-hearsay rule. *See United States v. Casteel*, 45 MJ 379 (1996); *United States v. Ureta*, 44 MJ 290 (1996); *United States v. McGrath*, 39 MJ 158 (CMA 1994); *United States v. Pollard*, 38 MJ 41 (CMA 1993); *United States v. Giambra*, 38 MJ 240 (CMA 1993). We have expressed some reservations about these statements, *see, e.g., United States v. Barror*, 23 MJ 370, 372 (CMA 1987), but have declined to adopt a rule rejecting statements to the police as *per se* unreliable. *United States v. Hines*, 23 MJ 125, 136 (CMA 1986).

AVAILABILITY

*White v. Illinois*, *supra*, recognized that the requirement of showing unavailability could not apply across the board to the more than 25 exclusions and exceptions for admitting hearsay statements. 502 U.S. at 356–57. Assuming availability need not be shown for statements of co-conspirators, excited utterances, and statements under the medical exception, the evidence in this case clearly supports the military judge's finding that J was unavailable under Mil.R.Evid. 804(a)(2) ("persists in refusing to testify concerning the subject matter. . .").

- J was unable to communicate beyond the word "fine" when she was first brought into the courtroom.

- J sat in the courtroom leaning her head against the side of the witness stand.

- Dr. Ebert, and expert, testified that J would be unable to testify in open court or via closed-circuit television.

- J was unable to testify at the Article 32 hearing in the presence of anyone except SA Chambers.

- Trial defense counsel indicated a belief that J was unavailable by stating:

I'm not waiving any right to cross-examine her, but under the circumstances it looks to me like she's not available to testify in this courtroom. . . . Well, there's no point in bringing her in here to have her cry. If she's not going to answer questions for the prosecution, I can't imagine she would answer them for me.

Considering J's age of 4 years, demeanor, and past experiences a the Article 32 hearing, as well as trial defense counsel's acknowledgment of unavailability (to a limited extent), and Dr. Ebert's testimony that J would be unable to communicate effectively, we hold that J was unavailable

under Mil.R.Evid. 804(a) and also under constitutional standards.

TRUSTWORTHINESS

J's statements in the videotape have the constitutionally required indicia of reliability.

In *Wright*, 497 U.S. at 805, the Supreme Court reversed the conviction of an accused child molester because the hearsay statements admitted against him under the residual-hearsay rule for unavailable witnesses did not possess an adequate indicia of reliability. The Court noted that the residual-hearsay exception is not firmly rooted and, therefore, one cannot infer reliability from the nature of the exception. *Id*, at 817. The Court held that the indicia of reliability must arise "from the circumstances in which the statement was made." *Id.* at 821. The Court noted that indicia of reliability include spontaneity, consistent repetition, mental state of the declarant, terminology unexpected of a child, and lack of motive to fabricate. *Id.* Corroborating evidence of the crime is not an adequate indicia of reliability when confrontation has not been satisfied. *Id.* at 826–827. Further, in that case, the interview with the child was not videotaped, involved leading questions, and was asked with a "preconceived idea of what the child should be disclosing." *Id.* at 812–813.

This Court has adopted additional factors as well including the length of time between the incident and the hearsay statements, and whether the witness admitted the truth of the hearsay statements under oath. *United States v. Morgan*, 40 MJ 405, 408 (CMA 1994); *McGrath*, 39 MJ at 158. This Court has also noted that corroborating evidence may be used to show the trustworthiness of residual hearsay when the witness is available for cross-examination, although that is not the situation in the case at bar. *Ureta*, 44 MJ at 296, citing *McGrath*, *supra* at 164–67.

In the case at bar, there are abundant indicia of reliability:

• Spontaneity: J answered non-leading questions regarding the incident with detail. For example, when asked, "What were you doing in the kitchen?" J responded, "He don't let me out; he say, 'Stay there.' "

• Consistent repetition: J's story did not change throughout the interview. Her account of events remained basically the same.

• Terminology: J used child-like terminology in explaining events. For example, she spoke of appellant "spanking" his "ding-dong."

• Lack of motive to fabricate: J had no known reason to fabricate the events.

J's videotaped interview elicited detailed answers about events that a 4-year-old should not know. It is doubtful that any 4-year-old could remember a lie in that much detail. In addition, the videotape provided the members with the opportunity to view the child's demeanor, her confusion on occasion, and her communication skills. There were few leading questions during the interview, and SA Chambers did not suggest appellant was the perpetrator. The videotaped interview shows numerous indicia of reliability.

J's unavailability and the trustworthiness of the videotape reveal that there was no Confrontation Clause violation in admitting the videotape under the residual hearsay exception.

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Chief Judge COX and Judge GIERKE concur.

SULLIVAN, Judge (concurring in the result):

I join my Brother, Judge Effron, in his separate opinion in this case. Moreover, I do not agree that evidence

corroborating the occurrence of a crime may be used to show trustworthiness of residual-hearsay evidence when the out-of-court declarant is available for cross-examination. *See United States v. McGrath*, 39 MJ 158, 169 (CMA 1994) (Sullivan, C.J., dissenting). Neither does the 10th Circuit which recently said:

> The precise issue in *Idaho v. Wright* was not the admissibility of evidence under Rule 803 (24). Rather, the petitioner in *Wright* challenged the admission of a hearsay statement on Confrontation Clause grounds. 497 U.S. at 808, 110 S.Ct. at 3143. One of the requirements of the Confrontation Clause, however, is that the hearsay statement "bear[] adequate 'indicia of reliability.' " *Id.* at 814, 110 S.Ct. at 3146 (internal quotation marks omitted). It was this requirement that the Court discussed at length in *Wright*. In doing so, it cited and discussed several lower court decisions that identify factors which should be considered in assessing the reliability of out-of-court statements by child witnesses in sexual abuses cases. *Id.* at 821–22, 110 S.Ct. at 3149–50. Importantly, each of the cases cited by the Court addressed the admissibility of such statements under exceptions to the hearsay rule–not the Confrontation Clause. Indeed, two of the cases involved the reliability requirement of the residual hearsay exception. *See Arizona v. Robinson*, 153 Ariz. 191, 735 P.2d 801, 811 (1987); *Wisconsin v. Sorenson*, 143 Wis. 2d 226, 421 N.W.2d 77, 83–86 (1988). In essence, the Court saw no meaningful distinction between Rule 803(24)'s requirement that a statement have "circumstantial guarantees of trustworthiness" and the Confrontation Clause requirement that it "bear adequate indicia of

> reliability." Thus, even though *Wright* is technically a Confrontation Clause case, its discussion of the reliability of hearsay statements by child victims of sexual abuse is equally pertinent to both Confrontation Clause cases and Rule 803 (24) cases.

*United States v. Tome*, 61 F.3d 1446, 1452 n.5 (1995).

Accordingly, I disagree with the majority on this point

EFFRON, Judge (concurring in the result):

In this case, the primary evidence against appellant consisted of accusatory hearsay evidence in the form of a videotaped interview of a 4-year-old child by a law enforcement officer. As the majority notes, the Supreme Court has stated that the Sixth Amendment right to confrontation does not establish a *per se* prohibition against use of accusatory hearsay testimony. *See, e.g., Ohio v. Roberts*, 448 U.S. 56, 63 (1980). The Supreme Court, however, has established a high hurdle that must be surmounted when the accusatory hearsay is offered under a residual exception to the hearsay rule, rather than under one of the traditional, or "firmly rooted," exceptions. *See Idaho v. Wright*, 497 U.S. 805 (1990) (excluding doctor's testimony about accusatory statement of alleged victim in child sexual abuse case under specific circumstances of case). I write separately to emphasize that my concurrence in the result is based upon the specific circumstances of this case.

In *Wright*, the Supreme Court stated that an accusatory hearsay statement could be admitted only if the statement bore "adequate indicia of reliability." 497 U.S. at 815 (internal quotation marks omitted). The Court added that reliability could be inferred "where the evidence falls within a firmly rooted hearsay exception," *id.*, such as the "excited utterance" exception. *Id.* at 820; *see* Mil.R.Evid. 803(2), Manual for

Courts-Martial, United States (1995 ed.). The Court emphasized, however, that because the residual hearsay exception did not fall within a "firmly rooted hearsay exception," an accusatory statement offered under that exception was "presumptively barred by the hearsay rule and the Confrontation Clause." *Id.* at 816–17. The presumptive exclusion could be overcome by "a showing of particularized guarantees of trustworthiness." *Id.* at 818, quoting *Roberts*, 448 U.S. at 66.

The Court rejected the proposition that the guarantees of trustworthiness could be demonstrated by evidence corroborating the accusatory hearsay declarant's statement because corroboration was not a satisfactory basis for evaluating the truth in the absence of cross-examination. *Id.* at 822–23. The Court emphasized that the "firmly rooted" hearsay exceptions, such as excited utterances, were based on the circumstances existing when the statement was made; the statements were deemed "so trustworthy that adversarial testing would add little to their reliability." *Id.* at 820–21. The Court noted that the "particularized guarantees of trustworthiness required for admission under the Confrontation Clause" could be demonstrated only by evidence concerning the "totality of the circumstances that surround the making of the statement and that render the declarant particularly worthy of belief." *Id.* at 820. As a result, the Court concluded, "unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the. . .statement." *Id.* at 821. The Court declined to establish a "fixed set of procedural prerequisites to the admission of such statements at trial," preferring that there be a case-by-case assessment based on the "totality of the circumstances." *Id.* at 818–19.

The majority opinion in the case before us describes the factors which indicate "particularized guarantees of trustworthiness" in terms of specific details of the interview. There are three additional factors, however, which are of concern in this case. First, the statement was made to a law enforcement officer during an investigatory interview when the focus was on appellant. Second, the interview involved a young child, implicating particular concerns as to suggestibility or manipulation. Third, the videotape omitted the 20-minute "rapport" session which preceded the child's accusatory statements, raising questions as to what the officer said to the child immediately before she made the accusations.

Although our Court has not established a *per se* rule of exclusion for accusatory hearsay statements made to law enforcement officers, we have noted that such statements "must always be viewed with suspicion." *United States v. Casteel*, 45 MJ 379, 382–83 (1996) (military judge properly exercised discretion to admit accusatory hearsay testimony based upon specific factors in case). The reason for such skepticism in terms of the hearsay rule is that "criminal investigators. . .often 'are not merely observing and evaluating but are seeking to build a case to prove guilt.' " *United States v. Guaglione*, 27 MJ 268, 274 (CMA 1988), quoting *United States v. Cordero*, 22 MJ 216, 223 (CMA 1986).

The problem of using a law enforcement interview is compounded in a child sexual abuse case because of the particular susceptibility of young children to suggestion and manipulation in the interview process, an issue which has been noted by a number of commentators. *See, e.g.*, Myers, *Taint Hearings for Child Witnesses? A Step in the Wrong Direction*, 46 Baylor L. Rev. 873, 916 and n. 206 (Fall 1994); Anderson, Note, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. Cal. L. Rev. 2117, 2146 (Sept.

1996). It is essential that any contact with the child, including a "rapport" session, not taint a subsequent interview. In this regard, the fact that a videotape was made of the interview, but not of the rapport session that immediately preceded it, could have raised serious questions about the guarantees of trustworthiness of this interview. In this case, however, defense counsel—who had ample opportunity to cross-examine the interviewing officer about the rapport session—chose to focus on the content of the interview and raised no questions about the conduct of the rapport session. As a result, it is understandable that counsel on appeal has not identified anything in the record about the rapport session that would undermine the other evidence relied upon by the military judge in holding that there were sufficient guarantees of trustworthiness to admit the statement.

The military judge conducted a detailed hearing pursuant to Article 39(a), Uniform Code of Military Justice, 10 USC § 839(a), on admissibility of the videotape and concluded that the questions in the interview were "not leading or overly suggestive" and the tape had "circumstantial guarantees of trustworthiness." While appellant has raised generalized Sixth Amendment concerns before this Court, he has not identified specific aspects of the interview that were accusatory, suggestive, or manipulative, or that would otherwise require us to hold that the military judge erred. Under the foregoing circumstances, I agree with the majority that the military judge did not err in holding that the videotape was admissible.

The concerns I have raised about use of law enforcement interviews and failure to provide a complete videotape of the pre-interview discussion are not intended to question the integrity of the law enforcement officers in this case or in general. These concerns reflect the Supreme Court's admonition that accusatory hearsay statements are presumptively excluded under the Confrontation Clause and

that any such statements admitted into evidence must bear "particularized guarantees of trustworthiness."

It is often necessary for law enforcement officials to use investigative techniques that involve leading or accusatory questions, and investigators often are not in a position to videotape all or part of pre-interview discussions. Such circumstances do not reflect a lack of professionalism or care, but they clearly impact on the separate issue of whether an out-of-court statement has been obtained under circumstances which guarantee trustworthiness equivalent to the trustworthiness of traditional exceptions to the hearsay rule—exceptions designed to approximate, insofar as practical, the truth-seeking attributes of in-court confrontation and cross-examination. If a witness is truly unavailable and the prosecution relies upon a videotaped interview in circumstances where the evidence raises specific questions about the conduct or reliability of the interview, such questions place a heavy burden on the prosecution to demonstrate "particularized guarantees of trustworthiness." Moreover, if the investigators have made a videotape that omits a "rapport" session or similar activity without a reasonable explanation, that omission could well prove fatal to the admissibility of the interview if there are circumstances calling into question the conduct of the rapport session. In that regard, those persons involved in videotaping interviews of child witnesses should heed the admonition of the Court of Criminal Appeals not to "selectively videotape their contact with child witnesses—all of the interview should be taped. . . ." *United States v. Cabral*, 43 MJ 808, 811 (1996).

## APPENDIX B

UNITED STATES

v.

Master Sergeant Mathew G. CABRAL, Jr., FR576–62–7821,
United States Air Force

ACM 30953

U.S. Air Force Court of Criminal Appeals.

Sentence Adjudged 3 Sept. 1993.

Decided 23 Jan. 1996.

Accused was convicted by general court-martial, Robert E. Kaszczuk, J., of sexual abuse of a four-year-old. The United States Air Force Court of Criminal Appeals, Pearson, Senior Judge, held that: (1) videotape of four-year-old victim's statements to investigating officer was admissible under residual hearsay exception for unavailable declarants; (2) accused forfeited challenge to nurse examiner's testimony; (3) accused forfeited challenge to prosecutor's closing argument and (4) sentence of a dishonorable discharge for sexual abuse of a child was not cruel and unusual punishment or too severe.

Affirmed.

**1. Military Justice ⚷ 1420, 1422**

In deciding whether military judge erred in admitting child's statement under residual hearsay rule, United States Air Force Court of Criminal Appeals uses abuse of discretion standard, and in applying that standard, Court generally accepts military judge's findings of fact unless they are

unsupported by evidence or are clearly erroneous. Military Rules of Evid., Rule 804(b)(5).

**2. Military Justice ⚷ 1422**

Where military judge's findings are silent or clearly erroneous, United States Air Force Court of Criminal Appeals may exercise its statutory discretion and find facts itself. UCMJ, Art. 66(c), 10 U.S.C.A. § 866(c).

**3. Military Justice ⚷ 1098**

Videotape of four-year-old victim's statements to investigating officer was admissible under residual hearsay exception for unavailable declarants in general court-martial for sexual abuse; victim was functionally unavailable as a witness, victim used child's language to describe sexual acts not within common experience of a four-year-old, agent adequately explained failure to videotape "rapport session," victim's description of acts was not prompted by leading questions, and accused did not offer any plausible motive for victim to fabricate story. Military Rules of Evid., Rule 804(b)(5).

**4. Military Justice ⚷ 1044, 1123**

Evidence of suggestive or coercive nature of interview of child victim goes to credibility of child's testimony and not its admissibility.

**5. Military Justice ⚷ 1415**

Accused forfeited challenge to nurse examiner's testimony that minor victim's injuries were consistent with sexual abuse, where accused did not object to nurse examiner's testimony that victim's injuries were consistent with sexual abuse. Military Rules of Evid., Rule 103(a)(1).

**6. Military Justice ⚷ 1416**

Accused forfeited challenge to prosecutor's closing argument where he did not object to argument at time it was made. R.C.M. 919(c).

**7. Military Justice ⚷ 1322.1**

Sentence of a dishonorable discharge for sexual abuse of a child was not cruel and unusual punishment or too severe, even though accused completed more than 20 years of active duty, which made him eligible for retirement.

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Appellate Counsel for Appellant: *John A. Wickam* (argued), *Colonel Jay L. Cohen*, *Lieutenant Colonel Frank J. Spinner*, and *Captain Richard D. Desmond.*

Appellate Counsel for the United States: *Captain Deborah M. Carr* (argued), *Colonel Jeffery T. Infelise*, *Colonel Thomas E. Schlegel*, *Major John H. Kongable*, and *Captain Timothy G. Buxton.*

Before PEARSON, BECKER, and MORGAN, Appellate Military Judges.

OPINION OF THE COURT

PEARSON, Senior Judge:

Court members convicted appellant of sexually abusing a friend's 4-year-old daughter, Jessica, and sentenced him to a dishonorable discharge, 7 years confinement, and reduction to E–1, which the convening authority approved. Appellant contends the military judge erred in admitting a videotaped interview with Jessica under the miscellaneous, or residual, exception to the hearsay rule; a nurse gave inadmissible testimony about Jessica's injuries; the prosecutor made an improper closing argument; and his sentence is too severe. We find the alleged errors lack merit and affirm.

## FACTS

On Friday, January 22, 1993, appellant's wife babysat Jessica. At about 6 p.m., Jessica's mother, Mrs. J, picked-up Jessica without incident. Sometimes that evening while watching television, Jessica told her mother, "I'm hurt, my hoi."

Mrs. J knew that "hoi," a Thai term, was Jessica's word for vagina. She examined Jessica and found redness around the vagina. When Mrs. J asked Jessica why her "hoi" was red, Jessica replied "Lumac play too rough with me." Mrs. J knew that "Lumac" was Jessica's nickname for appellant. Mrs. J asked Jessica what "play too rough" meant, and Jessica placed her hand on her vagina and began rubbing up and down.

The next day, Mrs. J took Jessica to a doctor who confirmed the redness. On Sunday, Mrs. J decided to report the incident to the local civilian police, but she first asked Jessica to tell her exactly what happened, stressing the importance of telling the truth. Jessica said appellant took her upstairs where he undressed her, and both licked and fingered her vagina. Jessica then described how appellant pulled out his "ding dong" and "slapped" it real fast. Jessica said she ran downstairs but appellant followed. In the kitchen, he placed her on the floor and once again licked her vagina. Jessica said appellant stopped only when his wife came home.

Ultimately, Jessica ended up at the Air Force Office of Special Investigations (AFOSI) for a videotaped interview on February 1, 1993. Agent Chambers, the interviewing agent, spent 20–30 minutes establishing "rapport" with Jessica which he did not tape. However, once he started asking questions, he started taping. At Agent Chamber's request, Jessica explained the difference between a "good" and "bad" touch, and between the truth and a lie. Jessica then recounted the incident with appellant much the same as she told her mother. Agent Chambers asked only one leading question, if

appellant showed her his "ding dong." Jessica replied that appellant "spanked it" and "played with it."

On February 2, 1993, a sexual assault nurse examiner interviewed Jessica who again recounted her incident with appellant. The nurse found an injury to Jessica's vagina consistent with digital penetration and a healing tear or fissure to her anus.

Jessica appeared as a witness at the pretrial investigation convened under Article 32, Uniform Code of Military Justice. 10 U.S.C. § 832. However, she refused to answer questions. Based on Agent Chambers' rapport with Jessica, the Article 32 investigating officer had Agent Chambers question Jessica at the AFOSI interview room so Jessica would be in familiar surroundings. All parties viewed the questioning from an adjoining room and could submit questions, and Jessica's testimony was videotaped. She once again gave a consistent description of the incident with appellant.

At trial, Jessica, now age 5, appeared as a witness at an evidentiary hearing but refused to answer any questions. *See* Article 39(a), UCMJ, 10 U.S.C. § 839(a). The military judge declared her unavailable for hearsay statement purposes. *See* Mil.R.Evid. 804(a). The prosecutor then moved to admit the February 1st videotaped interview between Jessica and the AFOSI agent.

In support of his motion, the prosecutor called Dr. Ebert, a forensic psychologist and attorney, who had reviewed the available evidence and interviewed Jessica. Dr. Ebert testified Jessica could not testify effectively for either side through any means of questioning. However, Dr. Ebert had also reviewed Jessica's videotaped interview with Agent Chambers. Dr. Ebert believed the language and physical expressions that Jessica used during the interview originated with her instead

of others, and the sexual acts she described were not in the common experience of a 4-year-old.

After reviewing the tape himself, the military judge reached the same conclusions as Dr. Ebert, finding "no evidence of suggested answers, rehearsed answers, or inappropriately leading questions." The judge admitted the videotaped interview with Agent Chambers as residual hearsay under Military Rule of Evidence (Rule) 804(b)(5). The judge also admitted Jessica's initial statements to her mother on January 22nd as statements of physical condition and for medical treatment under Rules 803(3) and (4), respectively. However, the military judge declined to admit any of Jessica's other hearsay statements or her videotaped Article 32 testimony.

## THE RESIDUAL HEARSAY

### *Appellant's Argument*

Appellant does not contest the judge's ruling admitting Jessica's initial statements to her mother, but focuses on her videotaped interview with Agent Chambers. He argues we should direct a hearing where the government must show by "clear and convincing evidence" that Jessica's interview was not tainted by any improper investigative techniques Agent Chambers may have used, such as not videotaping the "rapport" session. *Cf. State v. Michaels*, 136 N.J. 299, 642 A.2d 1372 (1994) (reversing child sexual abuse convictions based on "highly improper," "coercive," and "unduly suggestive" investigative interview techniques which tainted children's in court testimony and ordering "taint" hearing).

Appellant also urges us to adopt definitive procedural safeguards for pretrial interviews of young children which

must be complied with as a predicate to the admission of a child victim's residual hearsay statement. We decline appellant's invitation to legislate and, instead, follow established case law.

*Procedural Safeguards*

As a matter of federal constitutional law, the United States Supreme Court has rejected any formalistic checklist for investigative interviews of child sexual abuse victims as a condition precedent to admitting a victim's statement under the residual hearsay rule. Instead, the Court has focused on whether the statement has "particularized guarantees of trustworthiness" surrounding its making "which render the declarant particularly worthy of belief." *Idaho v. Wright*, 497 U.S. 805, 819–20, 110 S.Ct. 3139, 3148–49, 111 L.Ed.2d 638 (1990).

Such "guarantees of trustworthiness" include, but are not limited to, spontaneity, consistency, terminology unexpected of a child of similar age, lack of motive to fabricate, and the mental state of the declarant, based on the totality of circumstances. When these "guarantees" are present, the statement passes muster under the Confrontation Clause of the Sixth Amendment even though the declarant does not testify at trial under the rigor of cross-examination. *Id.*

The military's residual hearsay rule for an unavailable declarant tracks the Supreme Court's guidance. *See* Mil.R.Evid. 804(b)(5). The hearsay statement must have "circumstantial guarantees of trustworthiness" equivalent to long recognized, or "firmly rooted," hearsay exceptions. *United States v. Ureta*, 41 M.J. 571, 575–76 (A.F.Ct.Crim. App.1994) and cases cited therein. Even if it passes such reliability muster, the statement is admissible only when (1) offered as evidence of a material fact, (2) more probative on

the point for which it is offered than any other evidence reasonably obtainable, and (3) its admissibility serves the interests of justice. Mil.R.Evid. 804(b)(5).

*Standard of Review*

**[1, 2]** In deciding whether a military judge erred in admitting a child's statement under our residual hearsay rule, we use an abuse of discretion standard. In applying that standard, we generally accept the military judge's findings of fact unless they are unsupported by the evidence or are clearly erroneous. *United States v. Pollard*, 38 M.J. 41, 49 (C.M.A. 1993); *Ureta*, 41 M.J. at 575. Where the military judge's findings are silent or clearly erroneous, we may exercise our statutory discretion under 10 United States Code Section 866(c) and find the facts ourselves. *Ureta*, 41 M.J. at 575.

*Discussion*

**[3]** The materiality of Jessica's statement, its probative value, and its contribution to the interests of justice are not in issue—its reliability is. We have independently reviewed Jessica's videotaped interview, as well as the testimony of Agent Chambers. We conclude the military judge's factual findings are not clearly erroneous, and he did not abuse his discretion in admitting the evidence.

First, Jessica was "functionally unavailable" as a witness for residual hearsay analysis. *United States v. Martindale*, 30 M.J. 172, 173 (C.M.A.1990). In this regard, defense counsel did not request to call Jessica to the witness stand in front of the members so they could judge her demeanor for credibility purposes or otherwise assert appellant's Sixth Amendment right to confront his accuser. *See id.* at 175 n. 2.

Second, in the videotape, Jessica used a young child's language to describe sexual acts not within the common

experience of a 4-year-old. Third, Agent Chambers adequately explained his failure to videotape the "rapport session," and Jessica's description of the sexual acts was not prompted by leading questions. Fourth, appellant did not offer any plausible motive for Jessica to fabricate such a sordid story, and like the military judge, we find none. *See Pollard*; *Ureta*; *compare United States v. Lyons*, 36 M.J. 183 (C.M.A.1992) (not error to admit videotaped interview) *with United States v. Moreno*, 36 M.J. 107, 120–121 (C.M.A. 1992) (error to admit videotaped interview). Consequently, Jessica's statement possessed circumstantial guarantees of trustworthiness.

However, we do not encourage investigators to selectively videotape their contact with child witnesses—all of the interview should be taped, including "rapport" building sessions. In a closer case, an investigator's failure to tape an initial "rapport" session could be the scale-tipper.

*Taint Hearing and Clear and Convincing Standard*

**[4]** Appellant's argument for a "taint" hearing is not a novel one for this Court. In *United States v. Geiss*, 30 M.J. 678 (A.F.C.M.R.), *pet. denied*, 32 M.J. 45 (C.M.A.1990), we rejected the argument that the prosecution had to prove by clear and convincing evidence that a 14-year-old accuser's in court testimony was not the result of suggestive or coercive pretrial interviews. Instead, we held that the evidence of the suggestive or coercive nature of the interview went to the credibility of the child's testimony and not its admissibility.

Today, we reaffirm our holding in *Geiss*. Of course, here, we are not dealing with the impact of pretrial questioning on a child witness's in court testimony as in *Geiss*. Rather, we are concerned with the particularized, or circumstantial, guarantees of trustworthiness of a child's out-of-court

statement. As already discussed, suggestiveness and coerciveness factor in to the totality of the circumstances equation—they are not "the be-all and end-all here." William Shakespeare, *Macbeth*, act 1, sc. 7.

## REMAINING ISSUES

**[5, 6]** Appellant did not object to the nurse examiner's testimony that Jessica's injuries were consistent with sexual abuse. Consequently, appellant forfeited the issue, and we do not find plain error. Mil.R.Evid.103(a)(1); *see United States v. Prevatte*, 40 M.J. 396, 397 (C.M.A.1994); *United States v. Banks*, 36 M.J. 150, 160 (C.M.A.1992); *United States v. Suarez*, 35 M.J. 374 (C.M.A.1992). Likewise, appellant now complains about the prosecutor's closing argument but did not object at the time. We find the error forfeited and no plain error. R.C.M. 919(c); *United States v. Edwards*, 35 M.J. 351 (C.M.A.1992).

**[7]** Finally, we do not find appellant's sentence to a dishonorable discharge is cruel and unusual punishment or too severe even though he completed more than 20 years of active duty, which made him eligible for retirement. *See United States v. Lee*, 43 M.J. 518 (A.F.Ct.Crim.App. 1995); *United States v. Smith*. 28 M.J. 863 (A.F.C.M.R.), *pet. denied*, 28 M.J. 455 (C.M.A. 1989).

Accordingly, the findings and sentence are correct in law and fact, and on the basis of the entire record, are

AFFIRMED.

Judges BECKER and MORGAN concur.